IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

TEXAS, KANSAS, LOUISIANA, INDIANA, WISCONSIN, and NEBRASKA,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 7:15-CV-00151-O
UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ERIC HARGAN, in his Official Capacity as ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, UNITED STATES INTERNAL REVENUE SERVICE, and JOHN KOSKINEN, in his Official Capacity as COMMISSIONER OF INTERNAL REVENUE,	§	
Defendants.	§	

PLAINTIFFS' SUPPLEMENTAL REPLY BRIEF
IN SUPPORT OF SUMMARY JUDGMENT

INTRODUCTION

Defendants' responsive brief, ECF No. 84 (Defs.' Supp. Br.), espouses an exacting and rigid view of what constitutes "final agency action" and thus triggers the statute of limitations. Under Defendants' view, only certain types of actions constitute final agency action challengeable by Plaintiffs. Defs.' Supp. Br. 5.

However, whether the impact of agency action is "direct" is both a "'flexible' and 'pragmatic'" inquiry. *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) (quoting *Abbott Labs.*, 387 U.S. at 149–50). Neither the Supreme Court nor the Fifth Circuit employs a checklist for actions that do, or don't, qualify as "final agency action." The danger with applying bright lines to agency action is that agencies may act and impact the legal rights and obligations of many without those actions ever being subjected to judicial review. Here, Defendants acted in multiple ways to apply the new, ACA-originated HIPF to Plaintiffs within six years of Plaintiffs' suit.

The statute of limitations question, however, may be of no moment. As Plaintiffs demonstrate, Defendants promulgated several legislative rules within six years of Plaintiffs' suit. These rules may be challenged by Plaintiffs, and no analysis of the as-applied exception acknowledged by *Dunn-McCampbell* is required.

I. BY ANY MEASUREMENT, DEFENDANTS' MULTIPLE APPLICATIONS OF THE HIPF TO PLAINTIFFS ARE DIRECT.

Defendants seek to cabin what qualifies as "direct" agency action. But bright lines of liability defy the longstanding "flexible and pragmatic" requirement that intentionally avoids the type of rigid line drawing that creates impractical and counterproductive results. Rather than Defendants' proposed list of sufficient actions, what matters is "whether the *impact* on the plaintiff is direct and immediate." *Dunn-McCampbell*, 112 F.3d at 1288 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 456 (W.D. Pa. 2013). As stated by another court, "the key issue is whether the agency's position is 'definitive' and

has a 'direct and immediate effect' on the day to day business of the party challenging the agency." *PDK Labs Inc. v. Ashcroft*, 338 F. Supp. 2d 1, 11 (D.D.C. 2004) (quoting *Nat. Res. Def. Counsel v. EPA*, 22 F.3d 1125, 1132 (D.C. Cir. 1994); *Sabella v. United States*, 863 F. Supp. 1, 3 (D.D.C. 1994)). Looking at a direct *impact*, and not merely direct *interaction*, harmonizes *Dunn-McCampbell's* "direct" language with the "legal consequences" discussed in *Hawkes*.

Defendants more-or-less advocate that paper needs to change hands between the parties for Defendants' actions to have a "direct" impact on Plaintiffs. Specifically, Defendants advocate that Plaintiffs must "fil[e] a petition," "ask the agency to amend the regulation's definition," or "identif[y] an order 'direct[ly] . . . involving" any of the plaintiff States." Defs.' Supp. Brf. 5. But a paper trail, or direct interaction between the parties, may not constitute "final agency action." *See, e.g.*, *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 291 (5th Cir. 1999). And the Supreme Court is clear that formal engagements between the parties, like enforcement actions, are not required for final agency action to exist, *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Labs.*, 387 U.S. at 153). Thus, Defendants' insistence that Plaintiffs "petition" Defendants, "ask" Defendants, or receive "an order" from Defendants is contrary to law. Whether Defendants' actions are "direct" regards whether Defendants' actions affect or impact Plaintiffs.

Defendants note the cases cited by *Dunn-McCampbell*, as mere "example[s]," as supportive of their position. But the factual circumstances in those cases not only fail to define the universe of a "flexible and pragmatic" approach to APA actions, but those cases actually support Plaintiffs. *Wind River Mining Corp. v. United States* demonstrates an instance where a petition to the agency was practically necessary for agency action to be "direct." 946 F.2d 710 (9th Cir. 1991). In *Wind River*, when BLM identified Wilderness Study Areas (WSAs) in 1979, the WSAs had no connection to the Wind River Mining Corp. Thus, the company was not an object of the WSA

determinations and had no stake in the matter. Rather, the Wind River Mining Corp. did not begin staking mining claims within the WSAs until 1982. Thus, for the agency's action to be "direct" as to the Wind River Mining Corp., a subsequent petition or application by the company was required.

In *Public Citizen v. Nuclear Regulatory Commission*, that the plaintiff previously filed a petition with the NRC had nothing to do with whether their lawsuit was timely. 901 F.2d 147 (D.C. Cir. 1990). Public Citizen filed its lawsuit within the 60-day statutory time frame from the challenged action—a "revised" Policy Statement. The substance of the court's opinion regarded whether the "revised" statement substantively altered the prior statement such that it was subject to challenge, and not whether Public Citizen formally interacted with the agency before bringing its lawsuit. 901 F.2d at 150–53.

Texas v. United States, 749 F.2d 1144 (5th Cir.), *reh'g denied, cert. denied*, 472 U.S. 1032 (1985), also supports Plaintiffs. There, Texas was decidedly lacking in pre-suit interaction with ICC. As the Fifth Circuit noted,

> [n]otwithstanding its protestations to the contrary, Texas clearly had notice that the ICC contract rate rules would apply to intrastate as well as interstate commerce before those rules became final. Although the ICC's initial notice of interim contract rules was ambiguous in this regard, Texas received ample warning that the rules under consideration might be so applied. Despite this warning, Texas failed to participate in the rulemaking proceedings. Texas also failed to seek intervention or file an amicus brief in a Second Circuit case directly reviewing the contract rate rules. It has been suggested that "those who have had the opportunity to challenge general rules should not later be heard to complain of their invalidity on grounds fully known to them at the time of issuance." *Nevertheless, the Hobbs Act does not always bar review of a rule on these grounds. We, therefore, have jurisdiction to consider the [Texas] Railroad Commission's challenge to the statutory authorization for the rules adopted in Ex parte 387 and to the application of those rules in this particular case.*

Id. at 1147 (footnotes omitted) (emphasis added). It was the *application* of the rules to Texas, notwithstanding Texas's lack of interaction with the agency, that permitted the challenge to move forward. This is because "administrative rules and regulations

are capable of continuing application." *Id*. at 1146 (quotation omitted). In *Texas*, whether Texas's action was timely had nothing to do with whether a third party filed a petition, contrary to Defendants' suggestion. Defs.' Supp. Br. 3.

Even if the Court were to indulge Defendants' rigid viewpoint, the multiple agency actions of Defendants previously articulated by Plaintiffs, Pls. Supp. Br. 3–6, more than satisfy. Everything Defendants did to implement and apply the HIPF to Medicaid MCOs was done with Plaintiffs as a clear object the agency actions. Plaintiffs are not, for example, like the Wind River Mining Corp.—just one in a universe of endless individuals or companies unknown to Defendants that could possibly be affected by Defendants' actions. Rather, Plaintiffs (states) are a discrete and known quantity, and the ambassadors and implementers of Defendants' Medicaid program. For Defendants to contend that anything they do regarding Medicaid is not direct action regarding Plaintiffs strains the imagination. The reality is that anything and everything that Defendants do regarding Medicaid directly impacts Plaintiffs, and Plaintiffs are necessarily an object of such agency action, which undoubtedly causes "legal consequences" to Plaintiffs.

In the post-ACA, post-HIPF world, Plaintiffs all continue maintain and administer Medicaid programs. Plaintiffs' managed care agreements are all approved by Defendants. *See, e.g.*, Pls.' App. at 513–14.[1] Defendants discount the significance of CMS approving Plaintiffs' managed care agreements adding the HIPF to the capitation rates because these approvals are "not an order requiring [Plaintiffs] to undertake a particular action." Defs.' Supp. Br. 7. But even an "order" that "'ha[s] no authority except to give notice of how the Commission interpreted' the relevant statute," *Hawkes*, 136 S. Ct. at 1815 (quoting *Frozen Food Express v. United States*,

[1] Approval of post-HIPF managed care contracts is not unique to Texas. All Plaintiffs were required to adjust their MCO relationships to account for the HIPF in accordance with ASOP 49. *See, e.g.*, Pls.' App. 159, 166 ("Therefore, a [HIPF] adjustment to the capitation rate range to cover the expected cost of the fee is included as part of the capitation rate development"), 421.

351 U.S. 40, 44–45 (1956)), is nonetheless reviewable. Regardless, whether by order or approval letter, the *application* of the standard is what matters. Defendants' multiple actions, individually and collectively, each apply the new standards, and the HIPF, to the discrete set of sovereigns that implement and administer Medicaid.

II. DEFENDANTS' LEGISLATIVE RULES MAY BE CHALLENGED EVEN IF NOT DIRECTLY APPLIED TO PLAINTIFFS.

It is undisputed that Defendants promulgated several formal rules and regulations, all within six years of Plaintiffs' suit, and subsequent thereto. *See* Pls.' Supp. Br. 3, 5 n.11, 6 n.12. These rules may be challenged by Plaintiffs, and no analysis of the exception acknowledged by *Dunn-McCampbell* is required.

Plaintiffs may also sustain challenges to Defendants' post-ACA publications that did not go through notice and comment. "An agency may not, for example, avoid judicial review merely by choosing the form of a letter to express its definitive position on a general question of statutory interpretation." *Nat. Res. Def. Council, Inc. v. EPA*, 22 F.3d 1125, 1132–33 (D.C. Cir. 1994) (internal quotation marks omitted). The APA focuses on substance, not form.

Defendants ignore Plaintiffs' argument that Defendants' non-formal publications meet the standards of legislative rules under *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), thus making them final agency action and subject to challenge. *See* Pls. Supp. Br. 9–10. These publications may be challenged by Plaintiffs and need not be "direct[ly]" applied to Plaintiffs for an APA challenge to be sustained. Using a pragmatic and common sense approach, Defendants' various publications and actions indicate that Plaintiffs jeopardize their federal Medicaid funding if they choose to not pay the HIPF. Therefore, even if the Court were to find no "direct, final agency action involving [Plaintiffs] within six years of filing suit," it is of no moment. That Defendants' nonetheless promulgated legislative rules within six years of Plaintiffs' suit is sufficient for the Court's jurisdiction over Plaintiffs' APA challenges.

Respectfully submitted this the 27th day of November 2017,

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CERTIFICATE OF SERVICE

I certify that on the 27th day of November, 2017, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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